



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

February 22, 1990

Mr. William Grossenbacher  
Administrator  
Texas Employment Commission  
101 East 15th Street  
Austin, Texas 78778-0001

Open Records Decision No. 543

Re: Whether general aptitude tests obtained from a federal agency and held by the Texas Employment Commission must be released under the Texas Open Records Act, article 6252-17a, V.T.C.S. (RQ-1615)

Dear Mr. Grossenbacher:

Your office has requested a reconsideration of open records ruling OR88-361, which concluded that the General Aptitude Test Battery (GATB) administered by TEC was not excepted from disclosure by section 3(a)(1) of the Open Records Act, article 6252-17a, V.T.C.S.

In TEC's original request for a decision pursuant to section 7 of the Open Records Act, you claimed section 3(a)(1) as an exception to disclosure of the GATB materials. Your letter failed, however, to cite any statute, state or federal constitutional provision, or judicial decision that requires the GATB to be kept confidential by TEC. This deficiency was duly noted in OR88-361 and formed a basis for its ultimate conclusion. The letter requesting reconsideration of OR88-361 likewise failed to state the specific statutory or constitutional provision or case that mandates confidentiality. It noted that some of the requested materials are copyrighted. We have also been informed of an agreement between TEC and the United States Department of Labor, from which TEC receives the GATB, that places limits on the dissemination of GATB materials.

A manual supplied by the Department of Labor to TEC imposes conditions on the agency's use and distribution of GATB materials. The manual was originally drafted by the Department of Labor in the 1970s for use by state agencies administering the GATB under the Manpower Administration program. It requires participating state agencies and prime contractors to maintain strict confidentiality of the contents of testing materials, including the GATB. The

manual states that confidentiality of testing materials is necessary to maintain the effectiveness of the test for selection, counseling, and research purposes. The manual also states that security is essential because test results affect chances for employment and thus examinees are strongly motivated to achieve high test scores.

We have been informed that the manual was based on federal regulations, but that these regulations were repealed with the revision of federal labor programs to coincide with the enactment first of the Comprehensive Employment and Training Act and later of the Job Training Partnership Act. We have also confirmed that the Department of Labor is presently involved in a review of current regulations with particular attention devoted to the GATB. An official with the Department of Labor informed us that the department has always required state agencies and prime contractors to comply with the manual in order to receive the testing materials. Disclosure of the testing materials by TEC may result in termination of the agency's future use of the materials. Misuse of the testing materials by prime contractors can result in a reversion of the materials to TEC.

The absence of a specific federal statute or rule mandating confidentiality of GATB materials precludes a finding that the materials are excepted by section 3(a)(1). The previous discussion demonstrates, however, that there are substantial policy reasons for maintaining the confidentiality of the examination materials. These policies were recognized in prior opinions of this office which held that examination answers were not subject to public disclosure. See Open Records Decision No. 353 (1982) and authorities cited therein.

In OR88-361, however, it was stated that these opinions were of doubtful validity in light of the enactment of section 3(a)(22) of the Open Records Act. At the time of the ruling, section 3(a)(22) excepted curriculum objectives and test items developed by educational institutions receiving state funds. Relying on familiar rules developed for the construction of statutory exceptions, it was said that the express exception of test items developed by educational institutions meant that test items developed by other governmental bodies are not excepted from disclosure. The application of the maxim expressio unius est exclusio alterius in this context was necessarily based on the assumption that the legislature intended not only to provide an exception for test items developed by educational institutions, but also to require public disclosure of

testing materials used by other governmental bodies. We think, however, that section 3(a)(22) was simply intended to codify for certain purposes the policy expressed in the prior opinions, not to limit the application of that policy. Certainly, the policy expressed in the opinions is no less applicable to agencies other than educational institutions that also have a duty to administer examinations. See Attorney General Opinion JM-640 (1987).

The prior opinions acknowledged that the power to conduct examinations for certification, licensing, and placement purposes carries the implied power to maintain the confidentiality of the testing items, particularly where the test items are used on subsequent examinations. See Open Records Decision No. 353 (1982). In retrospect, it was incorrect to assume that, by the express mention of educational institutions in section 3(a)(22), the legislature expressed any opinion of the validity of our prior rulings.

This point is confirmed by the recent amendment of section 3(a)(22) to provide an exception for "test items developed by licensing agencies or governmental bodies." Acts 1989, 71st Leg., ch. 1248, § 9, at 5025. The latest amendment of section 3(a)(22) may best be viewed as a remedial enactment designed to avoid harsh and uncompromising results such as that reached in OR88-361. In any event, it is now quite clear that upon the original enactment of section 3(a)(22) in 1987, the legislature did not intend to deprive other governmental bodies with a duty to administer tests the implied power to preserve both the confidentiality of the testing items and the integrity of the examination process.

We have also learned that TEC employs two forms of the GATB; the second format is used only when an examinee retakes the test. The GATB thus satisfies the requirement of our earlier opinions that testing materials are not subject to disclosure if they are used on subsequent examinations. It has also been suggested that the previous opinions are distinguishable because they dealt with licensing and competitive examinations; the GATB, it is stated, measures aptitudes and is in no sense a competitive examination. However, the Department of Labor manual gives ample explanation of the need for the security measures it imposes. The fact that the examination measures aptitude does not, in our opinion, diminish the need for confidentiality, especially since examination scores determine job placement.

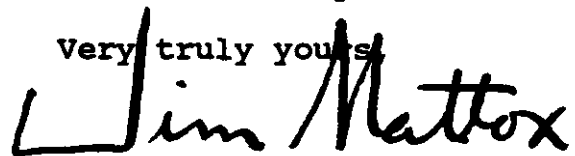
The informal ruling OR88-361 also cited the disclosure of GATB materials to private entities as further reason for holding that the test items must be made available to the requestor in this instance. It has since been clarified that the testing materials were released only pursuant to a revocable license granted by TEC to prime contractors authorized to administer the test by the Department of Labor. The contractors agree to observe the confidentiality requirements of the federal manual. In light of these restrictions on use and disclosure of GATB materials, we do not believe TEC has engaged in the selective disclosure of public records, a practice prohibited by section 14 of the Open Records Act.

Accordingly, we conclude that TEC is not required to disclose the contents of the GATB to the requestor. Our previous ruling, designated OR88-361, is withdrawn.

S U M M A R Y

The Open Records Act, article 6252-17a, V.T.C.S., does not require the Texas Employment Commission to publicly disclose the contents of the General Aptitude Test Battery.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive, slightly stylized font. The first name "Jim" is written with a large, looped "J" and a small "i". The last name "Mattox" is written with a large, looped "M" and a small "x" at the end.

J I M M A T T O X  
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